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In the Supreme Court of the United States

October Term, 1946

MILDRED McDONALD, now
MILDRED MUCK, *Petitioner,*

vs.

BERNARD G. SHEPHERD, *Respondent.*

Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support thereof.

MOE M. TONKON,
Counsel for Petitioner

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Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit and Brief in Support thereof.

TO: The Honorable the Supreme Court of the United States:

Comes now Mildred McDonald, now Mildred Muck, and petitions this Honorable Court for review on writ of certiorari of the decision of the United States Circuit Court of Appeals in the above entitled proceeding and respectfully shows the Court:

STATEMENT OF MATTER INVOLVED

This case apparently involves a matter of original impression. The Circuit Court of Appeals, the District Court, the Referee and the parties have all indicated that they have been unable to find any adjudicated decisions upon the precise principle involved.

The respondent in a prior bankruptcy proceeding received a discharge covering the identical debt owing to the petitioner, and which he scheduled in the present proceeding, and from which he is now seeking a second discharge. Following the discharge in the prior bankruptcy proceeding, the petitioner commenced an action in the state court to recover on her claim. In this action respondent, by way of answer, set out his discharge in bankruptcy in which he had listed the claim of the petitioner. The petitioner, by way of replication and avoidance, alleged that the respondent had waived the discharge and revived the debt. Judgment was rendered for the petitioner and thereafter, (but more than six years after the first proceeding), the respondent instituted a second bankruptcy proceeding, and scheduled as his only unsecured debt, the judgment claim of the petitioner. The petitioner contended that her claim should be excepted from the discharge in the second bankruptcy proceeding. The referee granted the petitioner's plea and

held that petitioner's debt was identical to the debt scheduled by the respondent in his first bankruptcy petition, and that after adjudication of the respondent in the first proceeding, and prior to and after his discharge therein, he expressly agreed to pay the petitioner the amount of her debt, notwithstanding the bankruptcy and the discharge, and pursuant to such promise made a partial payment to her prior to, as well as after, the discharge.

The referee held that the promise to pay the debt of the petitioner, notwithstanding the bankruptcy, was tantamount to a waiver and applying analagous decisions of this court and the general law that respondent was not entitled to a second discharge from the debt of the petitioner.

The opinion of the referee was adopted by the District Court and upon appeal to the Circuit Court of Appeals for the Ninth Circuit, the order excluding the petitioner's debt from the second discharge was reversed.

BASIS OF JURISDICTION TO REVIEW JUDGMENT

The jurisdiction of the Supreme Court of the United States is invoked under Section 24 (c) of the Bankruptcy Act of 1898 as amended (11 U.S.C.A. Section 47 (c));[1] Section 240 (a) of the Judicial Code as amended (28 U.S.C.A. Section 347 (a));[2] and the Revised Rules of the Supreme Court, Rule 38 (5).[3]

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1 Section 24 (c) of the Bankruptcy Act of 1898 as amended, provides:
"The Supreme Court of the United States is hereby vested with jurisdiction to review judgments, decrees and orders of the Circuit Court of Appeals of the United States . . . in proceedings under this act, in accordance with the provisions of the laws of the United States now in force or such as may hereafter be enacted."

2 Section 240 (a) of the Judicial Code as amended provides:
"In any case, civil or criminal, in a Circuit Court of Appeals . . . it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

3 Revised Rules of the Supreme Court, Rule 38 (5), provides:
(b) Where a circuit court of appeals has rendered a decision in conflict with the decision of another circuit court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has decided an important question of federal law which has not been, but should be, settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision."

THE QUESTIONS PRESENTED

Does the waiver of a discharge become a bar to a further discharge of the same debts in a subsequent proceeding commenced by the same bankrupt?

REASONS FOR ALLOWING WRIT

Your petitioner relies upon the following reasons for the allowance of this writ, and submits that the United States Circuit Court of Appeals for the Ninth Circuit has,

(1)

Decided an important question of federal law which has not been, but should be, settled by this court;

(2)

Decided an important question of federal law in conflict with applicable and analagous decisions of this court; and

(3)

Has departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the Seal of this Honorable Court, directed to the Circuit

Court of Appeals for the Ninth Circuit, commanding that court to certify and to submit to this court for its review and determination on a date certain to be therein named, a full and complete transcript of the record and all proceedings in the case No. 11,140, and entitled Bernard G. Shepherd, Appellant, vs. Mildred McDonald, now Mildred Muck, appellee, and that said judgment and decree of the said Circuit Court of Appeals for the Ninth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just and your petitioner will ever pray.

Respectfully submitted,

MOE M. TONKON,
Counsel for Mildred McDonald now Mildred Muck, Petitioner.

The undersigned, counsel for petitioner, certifies that the foregoing petition for writ of certiorari is well founded in law, and is not interposed for delay.

MOE M. TONKON.

In the Supreme Court of the United States

October Term, 1946

No._____

MILDRED MCDONALD, now
MILDRED MUCK, *Petitioner,*

vs.

BERNARD G. SHEPHERD, *Respondent.*

Petitioner's Brief in Support of Petition for Writ of Certiorari.

The opinion of the Circuit Court of Appeals was rendered and filed on September 16, 1946. It has not yet been officially reported, but appears in the transcript at pages 68-75. A petition for rehearing was not filed in this cause. The opinion of the trial court adopting the opinion and findings of the referee was made and entered on the 31st day of July, 1945, and is reported in 61 Federal Supplement 948, and appears in the transcript

at pages 36, 37. The opinion of the referee appears in the transcript at pages 12-28.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Section 24 (c) of the Bankruptcy Act of 1898, as amended, (11 U.S.C.A. 47 (c)); Section 240 (a) Judicial Code, (28 U.S.C.A. Section 347 (a)), and the Revised Rules of the Supreme Court, Rule 38 (5). The pertinent portions of the foregoing statutes and rule appear in the petition for the writ of certiorari (See petition, page 4).

The reasons set out in the petition for allowance of this writ (See petition, page 5), it is urged, are sufficient to invoke the jurisdiction of this Court under the statutes and rule of this court cited in the foregoing paragraph.

STATEMENT OF FACTS

Bernard G. Shepherd, respondent, was duly adjudged a bankrupt upon a voluntary petition filed in the United States District Court for the District of Oregon on June 26, 1931 (R-13). In this proceeding Mildred McDonald, now Mildred Muck, petitioner herein, was scheduled as a creditor to whom there was owing by the bankrupt on notes duly executed by him, the sum of approximately $2600.00. On October 21, 1931, in said proceeding, the

bankrupt was granted a discharge (R-14). Subsequently and on June 5, 1934, Mildred Muck, petitioner herein, commenced an action in the Circuit Court of the State of Oregon for the County of Multnomah against Bernard G. Shepherd, respondent herein, to recover judgment for sums due on the notes executed by him in favor of the petitioner and scheduled as aforesaid in his petition in bankruptcy (R-14).

In the action commenced in the Circuit Court of the State of Oregon, the respondent answered by admitting that he was indebted in the amount as alleged in the complaint, but as an affirmative defense plead his discharge in the bankruptcy proceeding. In this same action the petitioner herein in her reply admitted the discharge but by way of avoidance alleged affirmatively that after the respondent had filed his petition in bankruptcy and prior to his discharge, he had expressly promised and agreed to pay the amount owing upon the notes executed and delivered to her, and that he had stated that he had listed her as a creditor because he was required to do so, but that she could disregard the bankruptcy. In this plea the petitioner further alleged that pursuant to the agreement of the respondent as aforesaid, he had paid certain sums on account thereof before and after his discharge (R-14).

Upon trial before a jury duly empanelled, upon the issues as set out herein, a verdict was rendered in favor

of the petitioner and judgment based thereon was duly entered on August 7, 1935, for the full amount then owing upon the above described notes in the sum of $2543.95, with interest thereon at the rate of 6% per annum (R-14).

On December 16, 1941, respondent filed a second petition in bankruptcy in the same district in which his first petition had been filed, and in which petition he scheduled, as his only unsecured creditor the debt of the petitioner herein (R-14). In this second proceeding the petitioner interposed objections to the discharge of the bankrupt from her obligation on the ground and for the reason that the debt as scheduled was the identical obligation scheduled by the bankrupt as owing to the petitioner in the first bankruptcy proceeding, and in which he received a discharge, and that the bankrupt having expressly waived the right to assert the discharge against this particular debt, could not secure a second discharge from the same debt in the second proceeding (R-15).

The referee, before whom the matter was heard, following the filing of his opinion and findings, entered an order discharging the bankrupt from all of his debts, save and except the debt owing to the petitioner. (R. 28, 29) The District Court adopted the findings and order of the referee (R-36, 37) and upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, the

order denying the second discharge of the debt of the petitioner herein was reversed. (R-75, 76)

SPECIFICATION OF ERROR

The appellate court erred in failing to affirm the order of the District Court affirming the referee in that:

I.

It erroneously held respondent was entitled to a discharge from the debt of the petitioner.

II.

It erroneously disregarded the findings of the referee that petitioner's debt in the present proceeding is identical to the debt scheduled and discharged in the previous bankruptcy proceeding instituted by respondent.

III.

It erroneously held that a waiver of the discharge of petitioner's debt as scheduled in the respondent's first bankruptcy proceeding was not a bar to a second discharge by the respondent of the same debt in a subsequent proceeding.

ARGUMENT

Summary of the Argument

POINT A. The Circuit Court of Appeals for the Ninth Circuit has erroneously decided an important

question of federal law which has not been, but should be, settled by this Court.

POINT B. The Court below has decided an important federal question in a way probably in conflict with applicable and analagous decisions of this Court.

POINT C. The court below in its decision has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

POINT A.

Important Question of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

The United States Circuit Court of Appeals for the Ninth Circuit, the District Court, and the Referee before whom this case was heard, and all parties hereto agree that there is apparently no adjudicated authority upon the precise principle of law involved herein.

The legal question at issue involves the interpretation of the right to secure a discharge[1] and debts not affected by the discharge[2] of the Bankruptcy Act, as well as the substantive rules of law interpreting the waiver of the

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1 Section 14 of the Bankruptcy Act, as amended (11 USCA section 32)

2 Section 17 (a) of the Bankruptcy Act, as amended (11 USCA section 35)

effect of a discharge and the consideration of a new promise to pay the original debt.

The importance of the question involved should be apparent to the Court upon a consideration of the necessity of having a determination of the rights of a bankrupt and a creditor in a situation where a discharge has been granted and the bankrupt either with or without laudable motive wishes to pay a creditor notwithstanding the discharge.

Under Section 14 of the Bankruptcy Act, as amended in 1938 (11 U.S.C.A. Section 32) a bankrupt may waive his discharge as to *all* his debts by filing a written waiver of his discharge, or by failing to submit to examination at the discharge hearing. However, there is no provision in the Bankruptcy Act establishing the right of the bankrupt to waive the effect of the discharge of *one* of his debts or the rights of creditors, who without fraud, secure a waiver from the bankrupt of the effect of the discharge as to the creditor's particular debt. In the light of the absence of any adjudication directly in point, much confusion and conflict in decision will occur unless this Court establishes and determines the rights of the parties in a situation as it exists in the instant matter.

The question involved herein, being one of original impression, and involving a construction of the bank-

ruptcy act, and the related substantive law applicable thereto, it follows it is within the accepted class of cases which this court recognizes as a basis for taking jurisdiction by allowing a writ of certiorari.

POINT B.

The Court Below Has Decided an Important Federal Question in a Way Probably in Conflict with Applicable and Analagous Decisions of This Court.

Simply stated, the opinion of the referee, adopted by the District Court, held that a discharge in bankruptcy did not extinguish the debt but merely afforded a personal defense to the remedy which could be waived either by a new promise or a failure to present it in an action on the debt, and that the debt itself is not cancelled by the discharge and a waiver through a new promise simply removes the bar to the legal enforcement and renews the obligation to pay. *See Zavello v. Reeves,* 227 U.S. 625; 57 L.ed. 676; 33 S.Ct. 365.[1]

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[1] In Zavello v. Reeves, this Court held:
"It is settled, however, that a discharge, while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt. And in reason, as well as by the greater weight of authority, the date of the new promise is immaterial. **The theory is that the discharge destroys the remedy, but not the indebtedness**; that, generally speaking, it relates to the inception of the proceedings, and the transfer of the bankrupt's estate for the benefit of cred-

This waiver, according to the opinion of the referee and the District Court did not create a new debt, but merely renewed the old one, and this, it was held, would be true even though the original obligation was changed from the note form to that of a judgment.[2] Accordingly the bankrupt, in the light of the foregoing, was seeking in the instant matter a second discharge of a debt previously discharged and which discharge as to the particular debt had been expressly waived.

Finding no adjudicated decisions upon the precise point, the referee and the District Court relied by analogy on the decision of this Court in ***Freshman v. Atkins,*** 269 U.S. 121, 70 L. ed. 193; 46 S.Ct. 41, where it was held that *"the denial of a discharge from the debts provable or failure to apply for it within statutory time, bars an application under a second proceeding for a discharge from the same debts."* (Emphasis supplied)

This rule has been extended by other decisions of other

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itors takes effect as of the same time; that the bankrupt becomes a free man from the time to which the discharge relates, and is as competent to bind himself by a promise to pay an antecedent obligation, which otherwise would not be actionable because of the discharge, as he is to enter into any new engagement. . . ."

[2] Re Kuffler (CCA 2d) 168 F 1021 (writ of certiorari denied in (1909) 214 US 520, 53 L ed 1066, 29 S Ct 701); Re Summer (CCA 2d) 107 F (2d) 396, (writ of certiorari denied in (1940) 309 US 680, 84 L ed 1024; 60 S Ct 718); Re Schnabel 166 F 383.

courts,[1] as well as text writers,[2] to provide that application for a discharge made in due time but voluntarily withdrawn or abandoned is in legal effect the same as failure to apply, and accordingly a bar to a discharge in a second proceeding of debts provable in the former proceeding.

Furthermore, these established rules have not been altered by decisions of lower courts since the 1938 amendment to the Bankruptcy Act, wherein it is provided that the application for discharge is automatic upon the bankrupt's adjudication.[3]

The foregoing rule as promulgated by this Court in *Freshman v. Atkins,* supra, is made notwithstanding the specific provisions of Section 17 of the Bankruptcy Act providing "Debts not affected by a discharge." The Circuit Court of Appeals in its opinion by Justice Denman (R-72) in a review of *Freshman v. Atkins,* supra,

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1 In Re Summer (C.C.A. (2d) 1939) 107 F. (2d) 396; Perlman v. 322 West 72nd Street Company (C.C.A. N.Y. 1942) 127 F. (2d) 716; Shopnick v. Tokatyan, (C.C.A. 2nd, 1942), 128 Fed. (2d) 521; In Re Brown, 35 F. Supp. 619; Kuntz v. Young, 131 Fed. 719; In Re Kuffler, 151 Fed. 12; In Re Loughran, 218 Fed. 619; Matter of Schwartz (D.C. Ohio), 248 Fed. 841; Armstrong v. Norris (C.C.A. 8th) 247 Fed. 253; In Re Zeiler, (D.C. N.Y.) 18 Fed. Supp. 539. Colwell v. Epstein, 142 Fed. (2d) 138; annotation 156 ALR 836, 839.

2 Volume 7 Remington on Bankruptcy, 420, Section 3184, Note 17; Volume 1, Collier on Bankruptcy, 14th Edition, 1657, par. 17.27;

3 Perlman v. 322 West 72nd Street Co. Inc. (C.C.A. N.Y. 1942) 127 F. (2d) 716; In Re Brown, 35 F. Supp. 619; In Re Buchanan 62 F. Supp. 964.

of this Court held that the basis thereof was the invoking of the doctrine of res judicata, and that *accordingly it was an exception to Section 17 of the Bankruptcy Act.* This holding is not strictly true, for the Bankruptcy Act does not attempt to deal with the res judicata effect of a discharge or failure to secure a discharge of a particular debt. Such a doctrine or rule as may be held to be the basis of this Court's opinion in *Freshman v. Atkins,* is an application of pertinent substantive law affecting the rights of the parties, and which the Bankruptcy Act in no way restricts or affects. Similarly in the instant matter the right of the bankrupt to waive the effect of a discharge as to *one of his debts* and revive a discharged debt is not included in the provisions of the Bankruptcy Act.[1] It is earnestly contended that the Circuit Court of Appeals should have applied in its opinion and decision in the instant matter, by way of analogy the rule of waiver of the effect of a discharge as found in *Freshman v. Atkins,* supra, and the legion of other decisions of other courts following this rule.[2]

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[1] Section 14 of the Bankruptcy Act, as amended in 1938 (11 USCA section 32), provides for a written waiver by the bankrupt of his discharge of ALL of his debts.

[2] In Re Summer, (C.C.A. 2d, 1939) 107 F. (2d) 396; Perlman v. 322 West 72nd Street Company, (C.C.A. N.Y. 1942) 127 F. (2d) 716; Shopnick v. Tokatyan, (C.C.A. 2d, 1942) 128 Fed. (2d) 521; In Re Brown, 35 F. Supp. 619; Kuntz v. Young, 131 F. 719; In Re Kuffler, 151 Fed. 12; In Re Loughran, 218 Fed. 619; Colwell v. Epstein, 142 Fed. (2) 138; annotation 156 A.L.R. 836, 839.

The Circuit Court of Appeals in the opinion by Justice Denman (R-73) appears to have sought to justify a sentimental conclusion that the bankrupt who agreed to pay a discharged debt being an "honest" bankrupt, was entitled to the further refuge and aid of the bankruptcy forum if he defaulted on his assumption of payment. It is difficult to reconcile this view of the Circuit Court of Appeals with the spirit and intent of the Bankruptcy Act. Such a conclusion impliedly sanctions that a bankrupt who has secured a discharge should, in order to be styled "honest," agree to pay his debts notwithstanding the discharge, and further that if he fails to so agree, despite the provisions for a discharge and relief under the act, he may not be considered an "honest" debtor.

A bankrupt who wishes to pay his creditors, or any of them, notwithstanding the discharge, may do so without making an agreement, but it is submitted that if he makes an agreement to pay same, after having received a discharge, he should be bound by the legal effect of such an agreement. It is urged that, such an agreement being a waiver of the effect of the discharge, that the bankrupt cannot again apply for a discharge against the same debt. In the instant matter not only did the bankrupt make an agreement to waive the effect of the discharge as to petitioner's debt and agree to pay same, but he repudiated the agreement to pay the debt notwithstanding his agree-

ment, and now again seeks the relief of the bankruptcy court from the same debt. Surely it is more consonant with good policy to hold that a debtor have only one fair chance to relieve himself of debt and if he forgoes this opportunity he must take the consequences.

The opinion of the Circuit Court of Appeals erroneously assumes that the referee held that a promise to pay "based upon the moral obligation to pay a debt discharged in bankruptcy" is a waiver of the right to a discharge of a judgment in a subsequent bankruptcy proceeding (R-71). The referee did not hold that the basis for the new promise or waiver was moral consideration, but held (R-25, 26), in accordance with the better and more modern rule that promises to pay legally unenforceable debts, such as those barred by a discharge, are enforceable without consideration. See 1 Williston on Contracts (Rev. Ed. Williston & Thompson 1936) Sections 148, 158; A.L.I. Restatement of the Law of Contracts, Sections 85, 87; ***Tubbs v. McCabe*** (1933), 35 Del. 327; 165 Atl. 336.

These authorities hold that in a situation akin to that of the instant one, there is not the creation of a new debt, but the waiver of the privilege of disaffirmance. A.L.I. Restatement of the Law of Contracts (Ind. Ann.) Section 85, page 32; ***Tubbs v. McCabe, supra.***

Of like effect we find the view that a new promise

is nothing more than a waiver reviving the legal remedy and that whether the debt was a new or old one, was only a matter of form. *United States National Bank of La Grande v. Miller,* 118 Or. 280, 246 Pac. 726. This rule is consistent with the holding adopted by this Court and cited herein that a discharge bars only the remedy and does not cancel the debt. *Zavello v. Reeves,* supra.

It should be evident from the foregoing that the Circuit Court of Appeals has in its opinion and decision in the instant matter, and in the determination of the principle involved herein, failed to recognize the applicable and analagous decisions of this court.

POINT C.

The Court Below in Its Decision Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

The opinion of Justice Denman and the concurring opinion of Justice Garrecht of the Circuit Court of Appeals in this case discloses a failure to follow or recognize the uncontroverted facts in this matter, as found in the opinion of the referee and adopted by the District Court.

CIRCUIT COURT OPINION

(Justice Denman)

(R-68) " - - - The referee made no findings as to whether a n e w promise, made after the discharge, was proved at the state court trial - - - "

(R-69) " - - - Neither the referee nor appellee's brief makes any contention based upon the claims that the promise was made prior to the f i r s t discharge. *We hence assume that the appeal must be decided on the basis of such agreement of the parties t h a t a n e w promise was made by appellant Shepherd to appellee Muck a f t e r the discharge.*"

(emphasis supplied)

REFEREE'S FINDINGS

(R-14) "On June 5, 1934, Mildred Muck brought an action in the Circuit Court of the S t a t e of Oregon against the bankrupt to recover the amounts owing on said promissory notes. The defendant answered by admitting t h a t he was indebted in the amount alleged, but, as an affirmative defense, set up his discharge in bankruptcy. The plaintiff in her reply admitted the discharge, *but alleged affirmatively that after t h e bankrupt h a d filed his petition in bankruptcy and PRIOR to his discharge he had expressly promised and agreed to pay the notes; t h a t he had stated that he had listed her as a creditor because he was required to do so, but that she c o u l d disregard the bankruptcy. S h e alleged further that pursuant to the agreement he had paid certain sums on account thereof BEFORE AND AFTER his discharge.* - - - "

(R-21) " - - - The objecting creditor's claim is based upon a judgment obtained in an action for the recovery of money owing on cer-

tain notes scheduled in the previous bankruptcy. The bankrupt answered by admitting the obligation and setting up his discharge as a defense in bar. *The creditor replied, by way of avoidance, that the bankrupt had waived his discharge by agreeing to pay the debt notwithstanding his bankruptcy - - -*"

(emphasis supplied)

CIRCUIT COURT OPINION

(Justice Garrecht)

(R-74) "There are four fundamental questions in this case—those relating to waiver, res judicata, moral consideration and the basis of the creditor's suit in the state court. *If that suit had been bottomed on the old debt the doctrine of waiver would have prevented the debt from being discharged in the present bankruptcy proceeding.* If, on the other hand, the state action was based on the new promise, the judgment rendered therein correspondingly would partake of the nature of a new debt and would be dischargeable in the second bankruptcy. - - -"

(emphasis supplied)

REFEREE'S FINDINGS

(R-21) "The objecting creditor's claim is based upon a judgment obtained in an action for the recovery of money owing on certain notes scheduled in the previous bankruptcy - - - "

(R-28) " - - - The debt owing the objecting creditor is the same obligation from which the bankrupt received a discharge in his first bankruptcy."

Obviously if Justice Garrecht would have given consideration to the foregoing findings in the referee's opinion, his decision would have been, in accordance with his opinion, *that the waiver by the respondent would have prevented the petitioner's debt from being discharged in the present bankruptcy proceeding.*

The referee's findings of fact are to be accepted by the judge unless clearly erroneous. Vol. 1, Collier on Bankruptcy, 1385 par. 14.67. This has been similarly stated in Vol. 8, Remington on Bankruptcy, 32 et seq. Sec. 3718. The foregoing text discusses the effect of General Order XLVII promulgated by the United States Supreme Court and applicable in bankruptcy proceedings.

From the record in this cause it appears that there was no challenge or contradiction to the referee's findings as adopted by the District Judge. In fact the respondent at page 4 of his brief filed in this proceeding with the Circuit Court of Appeals states "The facts are clear and undisputed and are fully set forth in the referee's opinion."

In the opinion of Justice Denman and the concurring opinion of Justice Garrecht, it is clear that they erroneously assumed that the agreement or promise to pay the

debt of the petitioner by the respondent was made after the discharge. This erroneous assumption appears to be the principal basis for their opinion and the decision of the lower court.

This court has held in *Zavello v. Reeves*, supra, "The promise to pay a provable debt is as effectual when made after the filing of the petition and before the discharge as if made after the discharge."

The Circuit Court of Appeals has apparently disregarded the findings of the referee and determined the instant matter not in accordance therewith and in derogation of the accepted and usual course of judicial proceedings.

CONCLUSION

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers in order that it may determine an important question affecting bankruptcy law, which has not been, but should be settled by this Court, and that the usual course of judicial proceedings and applicable and analagous decisions of this Court having been disregarded by the Circuit Court of Appeals, that to such an end a

writ of certiorari should be granted and this Court should review the decision of the Circuit Court of Appeals for the Ninth Circuit, and finally reverse its decision herein.

MOE M. TONKON,

Counsel for Petitioner.